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THE EVOLUTION OF TITLE IX: PROSPECTS FOR EQUALITY IN INTERCOLLEGIATE ATHLETICS

Christina Johnson*

The American sportswoman has begun to achieve recognition for her participation in an arena historically reserved for the male athlete. Sport has long been a primary socializing agent that has emphasized the stereotypic masculine model of competition, power, and dominance.¹ This model is culturally per-

* Second Year Student, Golden Gate University School of Law

1. See, e.g., Oglesby, *The Masculinity/Femininity Game: Called on Account of* . . . , in *WOMEN AND SPORT: FROM MYTH TO REALITY* 75, 82 (C. Oglesby ed. 1978) [hereinafter cited as *WOMEN AND SPORT*] (citing Felshin, *Sport, Style, and Social Mode*, J. PHYSICAL EDUCATION RECREATION 31, 46 (1975), which makes the argument that sport is a primary social mode for stereotypic sexuality. "While hunting, politics, religion, and commerce may play a role, sport and warfare are consistently the chief cement of men's house comradery." K. MILLETT, *SEXUAL POLITICS* 48 (Virago Paperback ed. 1969). "[C]ertain play-forms may be used consciously or unconsciously to cover up some social or political design." J. HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 205 (Beacon Paperback ed. 1955). Commentators emphasize sport as a "masculine rite of passage":

In its social definition it is obvious that sport in the United States serves as a masculine rite of passage. It could not be a vehicle for socialization into manhood except that the idealized values invested in sport symbolically and socially have important masculine connotations. This may be so because men played more important roles in establishing both society and sport, or because men are simply more important in a social view; in any case, the assumption of sport as masculine is a basic aspect of it as a symbolic formulation of ideal values.

F. GERBER, J. FELSHIN, P. BERLIN & W. WYRICK, *THE AMERICAN WOMEN IN SPORT* 182 (1974).

The stereotypic model is taught and reinforced very early. Stein & Smithells, *Age and Sex Differences in Children's Sex Role Standards About Achievement*, 1969 Dev. PSYCH. 252, cited in Duquin, *The Androgynous Advantage*, in *WOMEN AND SPORT*, *supra*, at 93.

The perceived relation between sport and the quality of life in American society is central to an understanding of the predominantly male-oriented tenor of both the sports creed and of sports activities in America. Sports are seen as primary vehicles for enculturating the youth who will 'be the future custodians of the republic,' in the words of the late General

ceived as appropriate for men but basically inconsistent with the female role.² During the past ten years, women have emerged to shatter this stereotype by demonstrating their athletic abilities in all levels of competition. Their achievement, most notably in the area of intercollegiate athletics, has resulted in controversy regarding the proper governing structure for women's athletics.³

MacArthur. In America, roles involving the establishment and maintenance of security, leadership, control, and other instrumental functions are typically reserved for males. Therefore, given the claimed relation between sport and the greater society, it is to be expected that the focus will be upon males, with females being more or less ignored and excluded from the claimed benefits of sports.

H. EDWARDS, *SOCIOLOGY OF SPORT* 100 (1973).

2. See Horner, *Toward an Understanding of Achievement-Related Conflicts in Women*, in *WOMEN AND ACHIEVEMENT, SOCIAL AND MOTIVATIONAL ANALYSIS* 207, 207-08 (M. Mednick, S. Tangri & L. Hoffman eds. 1975) [hereinafter cited as *WOMEN AND ACHIEVEMENT*]. Horner finds that traditional notions of femininity continue to affect young men and women:

The prevalent image of women found throughout history, amidst both scholarly and popular circles, has with few exceptions converged on the idea that femininity and individual achievements which reflect intellectual competence or leadership potential are desirable but mutually exclusive goals. The aggressive, and by implication, masculine qualities inherent in a capacity for mastering intellectual problems, attacking difficulties, and making final decisions are considered fundamentally antagonistic to or incompatible with femininity. Since the time of Freud's treatise on the "Psychology of Women," the essence of femininity has been equated with the absence or "the repression of [their] aggressiveness, which is imposed upon women by their constitutions and by society" [Freud, 1933, p. 158].

. . . .
 . . . It is clear in our data . . . that the young men and women tested over the past seven years still tend to evaluate themselves and to behave in ways consistent with the dominant stereotype that says competition, independence, competence, intellectual achievement, and leadership reflect positively on mental health and masculinity but are basically inconsistent or in conflict with femininity.

Id.

3. The National Collegiate Athletic Association (NCAA) has been engaged in a struggle for control of women's intercollegiate athletics. On January 13, 1981, the NCAA voted to sponsor women's championships in Division I, which includes those colleges and universities having the most extensive and costly programs. As a result, approximately 215 women will be placed on key committees like the NCAA Council, Executive Committee and Infraction Committee. In January, 1980, the NCAA voted to sponsor five women's championships for Divisions II and III beginning in the 1981-82 season. *San Francisco Chronicle*, Jan. 14, 1981, at 61, col. 1. Division II colleges and universities have programs that are intermediate in size and cost, and Division III colleges have much

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Despite significant advances during the last decade, the sports-woman continues to face social and legal challenges in the eighties.

Enactment of Title IX of the Education Amendments of 1972⁴ enhanced the opportunity for women to participate in intercollegiate sports, yet complaints of sex discrimination continue to grow.⁵ Although there has been a dramatic increase in

smaller athletic programs overall. U.S. COMM'N ON CIVIL RIGHTS, *MORE HURDLES TO CLEAR* 21 (1980) [hereinafter cited as *MORE HURDLES TO CLEAR*]. The attempt by the NCAA to take over the AIAW sparked considerable controversy regarding control of intercollegiate athletics. The issue is whether intercollegiate sports programs should be governed by separate organizations as they have been up until recently, or by a unified governing organization. The Association for Intercollegiate Athletics for Women (AIAW), established in 1971, has been successfully sponsoring women's intercollegiate athletics and has continually emphasized the importance of academic as well as athletic achievement. Some members of the AIAW regard the NCAA action as counterproductive to the AIAW philosophy of sport, as well as to the continuing growth of women's athletics. See Wheeler, *NCAA v. AIAW, WOMEN'S SPORTS*, June 1980, at 20. The Women's Sports Foundation, in expressing their support for the AIAW, stated:

Historically, women have not had a significant role in intercollegiate athletic governance; intercollegiate athletics has been synonymous with men's athletics. Only in the last decade, with the creation of the AIAW as the women's intercollegiate athletic governing organization and the advent of Title IX of the Education Amendments of 1972, has our society begun to broaden its definition of athletics to include women.

Even now it remains common to refer to "athletics" and "women's athletics," as though the generic term were male and including women required a modifier. One of the prime effects of the NCAA's proposal to govern women's athletics may be to perpetuate the second-class citizenship of women in the athletic establishment.

The record of the NCAA with respect to women speaks for itself. It has opposed, at every opportunity, the passage and implementation of federal legislation dealing with equal opportunity for women in college athletics.

Women's Sports Foundation, *Down to the Wire: AIAW and NCAA, WOMEN'S SPORTS*, Jan. 1981, at 60.

4. Pub. L. No. 92-318, § 901, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-1686 (1976)). Title IX provides that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" For a discussion of Title IX's application to intercollegiate athletics, see Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34 (1977); Kadziel-ski, *Title IX of the Education Amendments of 1972: Change or Continuity?*, 6 J.L. & EDUC. 183 (1977); Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420 (1975); Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254 (1979) [hereinafter cited as YALE Note].

5. As of June 15, 1980, the Department of Education had received more than 130

women's participation,⁶ confusion and criticism regarding the practical application of Title IX continue to stall efforts by many sportswomen to participate with the same degree of institutional support afforded to men.⁷ Equal opportunity in intercollegiate athletics can be strengthened by clarifying the mandates of Title IX, affirmative action by intercollegiate athletic programs, and successful litigation on behalf of those athletes who are denied their rights under both Title IX and the equal protection clause of the fourteenth amendment to the United States Constitution.

This Comment will analyze the development of Title IX, as it affects female athletes, from its inception in 1972 to the publication by the Department of Health, Education and Welfare (HEW)⁸ of the final policy interpretation in December of 1979.⁹ In particular, the final policy will be carefully scrutinized to determine whether it is consistent with and, more specifically, how well it serves the important public policy goals which informed the statute.¹⁰ Although the analysis will reveal weaknesses in

complaints against 80 colleges and universities alleging sex discrimination in athletics. *Title IX Enforcement Begins Soon*, 17 NCAA News, June 15, 1980, at 1.

6. According to 1980 statistics compiled by the Women's Sports Foundation, 50% of all college athletes are female, an increase of 250% in 10 years. Although the number of sports offered women students has increased markedly since 1973-74 (from an average of 2.5 to 5 sports per institution), the number of sports available to men in 1978-79 was an average of 48 percent higher. *MORE HURDLES TO CLEAR*, *supra* note 3, at 24.

7. Colleges and universities continue to spend a disproportionately larger amount on men's athletics. During 1978-79, the average per capita expenditures for male athletes at institutions belonging to both the NCAA (Division I), and the AIAW was \$5,257, more than double the \$2,156 allocated for each female athlete. These universities spend an average of 14.3% of their total athletic budgets on women's athletics even though women constitute 28.9% of the athletes. *MORE HURDLES TO CLEAR*, *supra* note 3, at 29. In 1977-78 one major university was reported to have budgeted approximately \$5 million for men's athletics but only \$180,000 for women's athletics. Roach, *Is Title IX Scoring Many Points In Field of Women's Sports?*, N.Y. Times, Sept. 27, 1977, at 51, col. 1.

8. The Department of Health, Education and Welfare became two separate departments (Department of Education and Department of Health and Human Services) on May 4, 1980. Pub. L. No. 96-88, §§ 301, 506, 93 Stat. 677, 692 (codified at 20 U.S.C. §§ 3441, 3503 (Supp. III 1979)). Because this Comment analyzes regulations and policies issued by HEW, this name will be used throughout the discussion unless reference is made to developments specifically occurring after May 4, 1980. Soon after inauguration, President Reagan stated that he "plans to abolish" the Department of Education. Wall St. J., Jan. 30, 1981, at 1, col. 3.

9. 44 Fed. Reg. 71,413 (1979). The policy interpretation reflects HEW's interpretation of the intercollegiate athletic provisions of Title IX and its implementing regulations.

10. See note 14 *infra* and accompanying text, for discussion of legislative history.

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HEW's policy, specific remedies are suggested which will aid in ensuring equal opportunity for intercollegiate sportswomen.

I. LEGISLATIVE HISTORY

Title IX provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"¹¹ This language, specifically modeled after Title VI of the Civil Rights Act of 1964,¹² was designed to expand the earlier statute's prohibition against discrimination on the basis of race, color, or national origin in any federally assisted program.¹³ Legislative history makes clear that Title IX was prompted by a pervasive pattern of sex discrimination in all levels of education.¹⁴ Title IX's specific effect on and application

11. 20 U.S.C. § 1681 (1976). "Approximately 20,000 school districts and higher education institutions receive financial assistance from programs administered by HEW and now by ED [the Department of Education]. The Office for Civil Rights (OCR) is responsible for monitoring their enforcement with Title IX" U.S. COMM'N ON CIVIL RIGHTS, ENFORCING TITLE IX, at 7 (1980) [hereinafter cited as ENFORCING TITLE IX].

12. 42 U.S.C. § 2000d (1976). Title VI provides that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."

13. Originally Title IX was intended to amend Title VI by simply adding the word "sex." 117 CONG. REC. 9821-23 (1971) (remarks of Rep. Green). "This is identical language specifically taken from Title VI of the 1964 Civil Rights Act" 117 CONG. REC. 30407 (1971) (remarks of Sen. Bayh).

Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth a prohibition and enforcement provisions which generally parallel the provisions of Title VI.

118 CONG. REC. 5807 (1972) (remarks of Sen. Bayh). HEW concurs:

. . . Except for certain specific exemptions not directly pertinent to athletics, paragraph 901(a) of Title IX is virtually identical to paragraph 601(a) of Title VI of the Civil Rights Act of 1964. Since the language of Title IX so closely parallels that of Title VI, in the absence of specific Congressional indications to the contrary, the Department has basically interpreted Title IX consistently with interpretations of Title VI in similar areas.

40 Fed. Reg. 24,134 (1975).

14. See generally *Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Sex Discrimination Hear-*

to intercollegiate athletics is less clear, because athletics are never specifically mentioned in the statute itself. Senator Birch Bayh, sponsor of the bill, referred to athletics only twice during congressional debates on the subject.¹⁵ One of these statements, which most clearly reflects Title IX's coverage of intercollegiate sports, also foreshadows the later controversy regarding integrated teams:

I do not read [Title IX] as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated nor that the men's locker room be desegregated.¹⁶

That Title IX was intended to apply to intercollegiate athletics became clear when several proposed bills and amendments, seeking to exempt revenue-producing sports from the statute, were defeated. The first was introduced by Senator John Tower of Texas on May 20, 1974.¹⁷ His amendment provided, in

ings]. Representative Edith Green of Oregon, who later sponsored Title IX on the floor of the House during the debates in 1971 and 1972, was chairperson of the hearings. Testimony from the hearings indicates that educational institutions were the primary focus of complaints concerning sex discrimination. The hearings were relied upon in both houses during the subsequent debates on Title IX.

In the summer of 1970, Representative Edith Green, chairman of the House Special Subcommittee on Education, held extensive hearings on discrimination and related areas . . . Over 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world. Yet despite a situation which approaches national scandal, the problem has gone unnoticed for years.

118 CONG. REC. 5804-06 (1972) (remarks of Sen. Bayh). "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image." CONG. REC. 30406 (1971) (quoting THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES (April 1970)).

15. 117 CONG. REC. 30407 (1971) (remarks of Sen. Bayh) (no requirements that intercollegiate football be desegregated); 118 CONG. REC. 5807 (1972) (remarks of Sen. Bayh) (personal privacy in sports facilities must be maintained).

16. 117 CONG. REC. 30407 (1971).

17. S. 1539, 93d Cong., 2d Sess., § 536, 120 CONG. REC. 15,477 (1974) (as passed by Senate). See *Sex Discrimination Regulations: Hearings before the Subcomm. on Post-secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st

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part, that Title IX “shall not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donation to the institution necessary to support that activity.”¹⁸ The Tower amendment was subsequently deleted by the conference committee on the Education Amendments of 1974¹⁹ and replaced by what has become known as the “Javits Amendment.”²⁰ This amendment provides in pertinent part as follows:

Sess. 47 (1975); *Prohibition of Sex Discrimination Hearings Before the Subcomm. on Labor and Public Welfare*, 94th Cong., 1st Sess. (1975):

Mr. Chairman, it is interesting to me that in the midst of the highly vocal debate now going on whether or not Title IX should apply to either revenue producing sports in particular, or intercollegiate athletics in general, no one is making the argument that there is not discrimination against women. No football coach or athletic director is denying that there is something fundamentally wrong with a college or university that relegates its female athletes to second rate facilities, second rate equipment, or second rate schedules, solely because they are women. No one seriously disputes the fact that athletic budgets for women are a fraction of those provided for men. Instead, the argument has focused on the ability of certain intercollegiate sports to withstand the financial burdens imposed by the equal opportunity requirements of Title IX. To this end, those who feel such sports as football could not survive such financial strictures are seeking to exempt these sports from the mandates of Title IX, through the Tower bill, S. 2106.

As the Senate author of Title IX, Mr. Chairman, I am opposed to the Tower bill, not because I am oblivious to the economic concerns of those members of the NCAA opposing Title IX, but because I think their concern is based upon a misunderstanding of both what is required under the Title IX regulations and the true implications of the Tower proposal.

Id. at 46-47 (remarks of Sen. Bayh).

It is clear that the amendments seeking to exclude revenue-producing sports from the scope of Title IX were prompted, in part, by the concern that funds derived from such sports as football and basketball would be diverted to the women's program. There is, however, no evidence to support this contention.

Many men's athletic departments have expressed concern that funds to increase athletic opportunities for women would have to be taken from the men's program, adversely affecting other men's sports. The data presented in this and the previous chapters show, however, that men's budgets have increased substantially in the past five years and that men's programs continue to be considerably larger than women's programs.

MORE HURDLES TO CLEAR, *supra* note 3, at 30.

18. S. 1539, 93d Cong. 2d Sess., § 536, 120 CONG. REC. 15477 (1974).

19. S. REP. NO. 1026, 93d Cong., 1st Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4271.

20. Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974).

The secretary of HEW shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports.²¹

Following the Javits Amendment, other proposed amendments attempted to exempt revenue-producing sports from Title IX;²² these amendments died in committee. Additionally, Senator Jesse Helms of North Carolina introduced two bills designed to remove intercollegiate athletics from consideration under the statute. Neither bill passed.²³ In light of these unsuccessful congressional efforts to restrict the scope of Title IX, it is clear Congress perceived and intended the statute to cover intercollegiate athletic programs.²⁴ Moreover, Congress failed to disapprove

21. *Id.*

22. Representative O'Hara introduced a bill which sought to allow revenue-producing sports to use their profits to maintain their own teams before diverting them to other men's and women's teams. The bill was referred to the House Subcommittee on Post-secondary Education. The bill died in committee. See H. R. 8394, 94th Cong. 1st Sess., 121 CONG. REC. 21685 (1974). On July 15, 1975, Senators Tower, Bartlett, and Hruska co-sponsored a bill which again sought to exempt revenue-producing sports from Title IX. According to Sen. Tower, "[t]he purpose of our amendment . . . is to limit HEW's authority [in such an event] to aspects of intercollegiate sports programs other than the revenues produced by and used for individual sports activities." See S. 2106, 94th Cong., 1st Sess., 121 CONG. REC. 22778 (1975). Although the Senate Subcommittee on Education considered one amendment in hearings on September 16 and 18, 1975, it also died in committee. See 43 Fed. Reg. 18,774 (1978).

23. S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23736 (1975), 43 Fed. Reg. 18,774 (1978). On January 31, 1977, Senator Helms reintroduced previous S. 2146 as S. 535. The bill would have prohibited federal agencies from enforcing regulations pertaining to athletics where participation in those athletic activities was not a required part of the curriculum of an educational institution. See S. 535, 95th Cong., 1st Sess. (1977).

24. See *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 706 (D.C. Cir. 1971) (positive action by Congress rejecting limiting amendments reflects a clear purpose to which the court may refer in determining legislative intent); Gaal & DiLorenzo, *Legality and Requirements of HEW's Proposed Policy Interpretation of Title IX and Intercollegiate Athletics*, J. COLL. & U.L. 6 (1979) (unsuccessful attempts to exclude athletics from Title IX are evidence of congressional intent that athletics be covered); "If Title IX is inapplicable to intercollegiate sports, the Javits amendment would be a nullity. Even the Tower amendment presumes coverage for all but revenue-producing sports." Cox, *supra* note 4, at 36 n.15. See also YALE Note, *supra* note 4, at 1255 n.15 which states that: "[i]t can hardly be disputed that the statute includes athletics by its terms and the subsequent legislative history leaves no doubt that this interpretation was intended." But see Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (1976) (because athletic programs are not programs

HEW's Title IX regulations which specifically encompass sports.²⁵

HEW has the authority to issue regulations concerning athletics and to ensure they are implemented.²⁶ Title IX provides that the regulations must effectuate the purpose of the statute in educational programs or activities that receive federal financial assistance.²⁷ Legislative history clearly indicates that the goal of the statute is elimination of sex discrimination in educational institutions that receive federal funds. HEW interprets the statutory mandate to mean that a program "will be subject to the requirements of the regulation if it receives or benefits from federal assistance"²⁸ Federal financial assistance is defined as any grant or loan by the government to the educational institution that may then be used for anything from resto-

or activities which receive direct financial assistance within the meaning of the statute, they are exempt from HEW regulation).

25. See 43 Fed. Reg. 18,774 (1978), which notes:

"Under Section 431(d) and (f) of the General Education Provisions Act; HEW was required to submit any Title IX regulation to Congress for review 45 days before its effective date. During the 45-day period, the law allows Congress, by concurrent resolution, to disapprove the regulation in whole or in part."

Though several resolutions were considered, they were ultimately rejected by the House Postsecondary Education Subcommittee. *But see* Gaal, & DiLorenzo *supra* note 24, at 166 n.30, which asserts that failure of Congress to disapprove regulations, although indirect evidence of congressional intent, may not be construed as approval of regulations.

26. 20 U.S.C. § 1682 (1976). The section provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 [20 U.S.C. Section 1681] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

27. *Id.*

28. 40 Fed. Reg. 24,128 (1975).

Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that the education functions of a school district or college include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination

Id.

ration to scholarships.²⁹ According to HEW, intercollegiate athletics are clearly educational programs or activities that receive federal financial assistance.³⁰ Although the athletic programs may not receive direct assistance, they are still subject to Title IX's broad prohibition against sex discrimination if they benefit from federal funds.³¹ If an educational institution fails to comply

29. 40 Fed. Reg. 24,137 (1975):

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payments to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance of guaranty.

Id.

30. In our opinion, a revenue-producing intercollegiate athletic program is (a) an education program or activity within the meaning of Title IX, and (b) an integral part of the general undergraduate education program of an institution of higher education. Accordingly, in our opinion, an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue-producing intercollegiate athletic activity if either the athletic activity or the general education program of which the athletic activity is a part is receiving Federal financial assistance.

Memorandum of F. Peter Libassi, HEW General Counsel, *reprinted in* 43 Fed Reg. 58,075 (1978).

31. HEW derives authority for its "benefiting" approach from *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd. mem.*, 529 F.2d 514 (4th Cir. 1975). The district court held that direct payments to veterans under federal assistance statutes

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with the regulatory provisions of Title IX, federal financial assis-

constituted federal financial assistance to the university under Title VI. The court listed three reasons for this conclusion:

(1) [p]ayments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would, in the absence of federal assistance, be spent on the student . . .

(2) [t]he participation of veterans who—but for the availability of federal funds—would not enter the educational programs of the approved school, benefits the school by enlarging the pool of qualified applicants upon which it can draw for its educational program . . . , and

(3) [t]he historical development of federal educational benefits for veterans persuasively indicates that the statutes in question are covered in Title VI.

396 F. Supp. at 602-03. The court further noted that “[a]lthough the VA payments are not earmarked for school related expenditures, e.g., tuition, all that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the approved school.” *Id.* at 603 n.22. The court based its finding of discrimination under Title VI on the university’s refusal to admit “unmarried nonwhites” due to their belief that “intergration of the student body would lead to inter-racial marriage thereby violating God’s command.” *Id.* at 600. The court found that the admissions policy constituted discrimination in a program which received federal financial assistance. *See* Gaal & DiLorenzo, *supra* note 24, at 170-71 (courts recognize role of athletics in overall educational program); 40 Fed. Reg. 24,128 (1975):

Section 86.11 in Subpart B, provides that the regulation applies ‘to each education program or activity which receives or benefits from Federal financial assistance’ administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that the education functions of a school district or college include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination

Id.

But see Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 Ky. L.J. 656, 686 (1977), in which the author maintains that HEW cannot rely on *Bob Jones* as authority for the contention that “money given to one entity within the university frees money to be used elsewhere”

The district court for the Eastern District of Michigan recently held that Title IX “extends only to those education programs or activities which receive direct financial assistance.” *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376 (E.D. Mich. 1981) (Memorandum Opinion and Order on file at the Golden Gate University Law Review Office.). The amended complaint alleged the school board had violated Title IX, as well as two state statutes, by excluding plaintiff’s daughters from the Pioneer High School golf team. *Id.* at 2. Additionally, the complaint alleged that the refusal by the school to provide a “separate boys’ and girls’ golf team was a denial of [plaintiff’s] daughters’ rights to equal education opportunities.” *Id.* Although the school board subsequently formed a separate golf team for girls, the court considered whether plaintiff could have prevailed under Title IX in order to resolve the remaining claim for attorney fees. *Id.* at 4. The primary issue was whether Title IX mandates an institutional approach, in which case it would apply to any institution receiving federal funds regardless of whether these funds go

tance may be withdrawn,³² although Congress retains the right to review and reject any proposed cut-off within thirty days of the decision to terminate.³³ Any decision by HEW to terminate public assistance is subject to judicial review.³⁴

Title IX provides that termination or refusal of funds for failure to comply with the statute "shall be limited in its effect to the particular program or activity or part thereof in which noncompliance has been found."³⁵ HEW reads this language as giving it authority to terminate any federal funds received by a

directly to the athletic program, or a programmatic approach which essentially requires that a specific program, to be subject to Title IX, must receive direct federal funding. In reaching its conclusion that the statute mandates a programmatic approach, the court totally discounted earlier case interpretations construing Title VI. The court distinguished these cases by finding that racial discrimination affects all educational programs and activities while sex discrimination is perceived as affecting only the specific athletic program under attack. This assessment fails to acknowledge or consider the legislative history of Title IX. See *Sex Discrimination Hearings*, *supra* note 14 and accompanying text. Additionally, discrimination in the athletic program may only be a "surface indicator of a broader based pattern or policy of sex discrimination at the university." Gaal & DiLorenzo, *supra* note 24, at 172. See also note 47 *infra* and accompanying text.

At least two recent district court decisions found that a university will be subject to Title IX even though federal funds may not go directly to the organizations or programs under review. See *Iron Arrow Honor Soc'y v. Califano*, 597 F.Supp. 590 (S.D. Fla. 1980); *Grove City College v. Harris*, 500 F. Supp. 253 (W.D. Penn. 1980.) HEW athletic regulations require Title IX compliance in every program and activity administered by a university which receives or benefits from federal funds. Even when the only form of funding is federally guaranteed student loans, under *Grove City*, the university will be subject to the requirements of Title IX. These cases reflect the legislative purpose behind Title IX and are consistent with HEW's interpretation of the statute. The conclusion reached in *Othen v. Ann Arbor School Bd.*, *supra*, by contrast, contradicts the construction placed on Title IX by most authorities.

32. 20 U.S.C. § 1682 (1976).

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found

Id.

33. *Id.*

34. *Id.* § 1683.

35. *Id.* § 1682. For full text of the provision, see note 32 *supra*.

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school when that school violates Title IX.³⁶ Thus, if a school's intercollegiate athletics program runs afoul of Title IX regulations or guidelines, HEW has the power to terminate federal funds received by the athletic program as well as funds received by any other school programs that are found to be tainted by the discrimination in the athletic program.³⁷

HEW relies on *Board of Public Instruction v. Finch*³⁸ for this interpretation, despite the fact that the specific holding of *Finch* does not support HEW's reading of the statute. In *Finch*, the Fifth Circuit reviewed an order of HEW cutting off all federal funds received by the school district because of a violation of Title VI.³⁹ To determine whether HEW had the authority to terminate funds for three different school programs,⁴⁰ the court construed a provision of Title VI that is virtually identical to that of Title IX.⁴¹ The court held that the term "program" did

36. 40 Fed. Reg. 24,128 (1975).

Title IX requires in 20 U.S.C. 1682 that termination or refusal to grant or continue assistance 'shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found.' The interpretation of this provision in Title IX will be consistent with the interpretation of similar language contained in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1). Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in Title VI, which holds that Federal funds may be terminated under Title VI upon a finding that they 'are infected by a discriminatory environment . . .'

Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969).

37. 40 Fed. Reg. 24,128 (1975).

38. 414 F.2d 1068 (5th Cir. 1969).

39. *Id.* at 1071. When meetings between HEW and school officials failed to remedy the problem, General Counsel for HEW initiated administrative proceedings which confirmed the school district's failure to comply with the Title VI regulations and implementing guidelines. Based on this determination, HEW entered an order terminating federal financial assistance to the school district.

40. *Id.* at 1074. "Three separate and distinct federal programs are here involved. One concerns federal aid for the education of children of low income families; one involves grants for supplementary educational centers; the third provides special grants for the education of adults who have not received a college education." *Id.*

41. 42 U.S.C. § 2000d-1 (1976). The statute provides:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity

not mean "school program" as HEW contended.⁴² Rather, "program" means "a particular program, within a state, within a county, within a district, even within a school"⁴³ which is covered by an individual grant statute (a congressional statute authorizing funding to specific school programs). The court concluded that in terminating funds, HEW must review each individual program for discrimination and "must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."⁴⁴

Dicta in *Finch*, however, does lend support to HEW's position that it has broad authority to terminate funds under Title IX. The *Finch* court, for example, noted that if funds provided by a grant "support a program which is infected by a discrimina-

to any recipient or to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found

Finch is the only case thus far to rule on the language of this provision.

42. 414 F.2d at 1077.

We must also reject HEW's interpretation of the term "program" as that term is used in the statute. While it is true as HEW points out that during the Senate debate on Section 602 of the Act (42 U.S.C.A. Section 2000d-1) fears were expressed that termination of aid to schools might also lead to termination of aid to roads and highways, see 110 Cong. Rec. 7059 (1964); 110 Cong. Rec. 7067 (1964), such expressions of concern do not mark the inner limits of the term 'program'. In the first place the statute requires that termination be limited 'to the particular program, or part thereof' [emphasis added] found not in compliance with the Act. Even if 'program' meant school program, as HEW contends, some meaning would have to be assigned to the parenthetical phrase, 'or part thereof.' The logical candidate would be the individual grant statutes which constitute the so-called 'school program.'

Id.

43. 414 F.2d at 1078. The language "even within a school" (emphasis added)—considered with other language in the opinion—suggests that the range of activities covered by the term "program" broadens as the unit under examination narrows. See notes 44-47 *infra* and accompanying text.

44. 414 F.2d at 1079.

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tory environment," then HEW has the power to terminate those funds.⁴⁵ The court also cautioned that, in demanding a program by program review of discrimination, "we do not mean to indicate that a program must be considered in isolation from its context."⁴⁶ The point at which one discriminating program will be found to infect another is unclear but one commentator suggests that "discrimination in an intercollegiate program infects both the physical education program and the general education program."⁴⁷ HEW's interpretation of *Finch* serves to enhance its own regulatory power to effectuate the purposes of Title IX.

II. THE REGULATIONS

A. THE PROPOSED REGULATIONS

On June 20, 1974, HEW issued its proposed regulations.⁴⁸ Section 86.38 of the regulations bars discrimination on the basis of sex in a recipient institution's physical education and athletic

45. *Id.* at 1078. *But see* Kuhn, *supra* note 24, at 68-70 (HEW has expanded the infection theory beyond the scope permitted by court in *Finch*); *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980) (challenging HEW's interpretation and implementation of Title IX). In YALE Note, *supra* note 4, at 1256 n.15, the author contends that "despite these challenges, it seems likely that HEW's interpretations will be upheld, since its approach to Title IX parallels its interpretation of a similar provision in Title VI . . ."

46. 414 F.2d at 1078-79.

47. Gaal & DiLorenzo, *supra* note 24, at 172. Gaal and DiLorenzo justify this statement as follows:

As noted above, it is generally accepted that the intercollegiate athletic program is an integral part of the general educational program. The infectious impact of discrimination in athletic programs is not difficult to visualize. Such discrimination is likely to deter any woman serious about athletics from enrolling at the discriminating institution. Additionally, potential female students may well view discrimination in athletics as a surface indicator of a broader based pattern or policy of sex discrimination at the university. In either event, athletic discrimination, by influencing general admissions, might be construed as infecting the overall educational program.

Id. The Department's views are stated at 40 Fed. Reg. 24,134 (1975):

Paragraph 86.41(a) provides that athletics must be operated without discrimination on the basis of sex. The Department continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of Title IX *even in the absence of Federal funds going directly to athletics.*

(Emphasis added.)

48. 39 Fed. Reg. 22,228-40 (1974).

programs.⁴⁹ HEW cites *Brenden v. Independent School District 742*,⁵⁰ as authority in asserting general Title IX jurisdiction over such athletic programs.⁵¹ In *Brenden*, two female high school students were not allowed to participate in interscholastic tennis, cross-country skiing, and cross-country running. They sued the school district under the equal protection clause of the fourteenth amendment to the United States Constitution.⁵² Plaintiffs alleged that the league rule⁵³ prevented them from playing on the existing boys' teams in these sports even though the girls could compete effectively on these teams.⁵⁴ No separate team was provided for girls by their schools in these sports.⁵⁵ The district court cited Title IX as evidence of congressional intent "to eliminate discrimination based on stereotyped characterizations of the sexes."⁵⁶ In affirming the district court's decision, the Eighth Circuit held that plaintiffs must be allowed to participate on their school's teams, and enjoined the high school league from imposing sanctions on the high schools for compliance with the order.⁵⁷ The court based its decision, in part, on the findings of the President's Task Force on Women's Rights⁵⁸ and on testi-

49. *Id.* at 22,230.

50. 477 F.2d 1292 (8th Cir. 1973).

51. 39 Fed. Reg. at 22,230 (1974).

52. 477 F.2d at 1294. Cases brought under the fourteenth amendment of the United States Constitution are filed under 42 U.S.C. § 1983 (1970). The statute offers a right of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." of the United States.

53. The Minnesota State High School League rule stated: "Girls shall be prohibited from participation in the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing the boys' team." 477 F.2d at 1294.

54. *Id.*

55. *Id.*

56. *Id.* at 1296.

57. Quoting the district court, the Eighth Circuit stated:

In summary, the Court is confronted with a situation where two high school girls wish to take part in certain interscholastic boys' athletics; where it is shown that the girls could compete effectively on those teams; and where there are no alternative competitive programs sponsored by their schools which would provide an equal opportunity for competition for these girls; and where the rule, in its application, becomes unreasonable in light of the objectives which the rule seeks to promote. Brought to its base, then, Peggy Brenden and Tony St. Pierre are being prevented from participating in the boys' interscholastic teams in tennis, cross-country, and cross-country skiing solely on the basis of the fact of sex and sex alone.

Id. at 1294.

58. 477 F.2d at 1298. See note 14 *supra* and accompanying text for a discussion of

mony from the Sex Discrimination Hearings.⁵⁹ One author notes that “*Brenden* therefore reflected the new national policy against sex discrimination in education.”⁶⁰

The proposed regulations, reflecting the holding in *Brenden*, included specific procedures designed to eliminate sex discrimination in intercollegiate athletic programs.⁶¹ Perhaps the most promising feature of the regulation—later deleted from the final version—was the requirement that the recipient institutions affirmatively attempt to accommodate the interests and abilities of women.⁶² Section 86.38(c)⁶³ defined affirmative efforts as 1) informing women of their opportunity to participate in athletics, and 2) providing them with support and training designed to enhance their athletic abilities.⁶⁴ As part of the affirmative action mandate, HEW required each institution to make an annual assessment of those sports in which members of each sex wanted to participate.⁶⁵ One commentator has stated that, “[b]y making the interests of the student body, and particularly female students, the primary determinant of which sports would be sponsored, the [proposed] regulation would have revolutionized intercollegiate athletics.”⁶⁶ The affirmative action section was the most dramatic indication of HEW’s determination to implement the goals of Title IX.

HEW solicited comments from interested individuals and organizations⁶⁷ soon after the Office for Civil Rights⁶⁸ gave notice of the proposed regulations. HEW received nearly 10,000 re-

this report.

59. 477 F.2d at 1298. See note 14 *supra* and accompanying text for summary of content of hearings. In delineating the widespread practice of discrimination against women, the Sex Discrimination Hearings were an important influence on Congress in enacting Title IX.

60. See Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX L. REV. 103, 107 (1974). “Thus, *Brenden* may provide the foundation on which the first cases decided under Title IX will build.” *Id.*

61. 39 Fed. Reg. 22,230 (1974).

62. *Id.* at 22,236.

63. *Id.*

64. *Id.*

65. *Id.*

66. Cox, *supra* note 4, at 52.

67. 40 Fed. Reg. 24,128 (1975).

68. OCR is responsible for the enforcement of Title IX. See note 169 *infra* and accompanying text.

sponses.⁶⁹ The National Collegiate Athletic Association (NCAA) urged that intercollegiate revenue-producing sports be exempt from Title IX.⁷⁰ Although HEW did not adopt this proposal, it did delete the affirmative efforts requirement due to confusion over how the annual student poll was to be conducted and the apparent misinterpretation of the provision relating to equal opportunity.⁷¹ These deletions indicate the continuing controversy over the extent to which Title IX will penetrate the traditionally male-dominated arena of intercollegiate athletics. If affirmative efforts are no longer required, Title IX's broad prohibition against sex discrimination may be weakened. A comparison of the final regulations with the proposed regulations reflects the impact of the NCAA's lobbying efforts.⁷²

B. THE FINAL REGULATIONS

The final regulations became effective on July 21, 1975.⁷³ Section 86.41 sets forth the provisions governing athletics.⁷⁴ The

69. A substantial number of comments was received by the Department on the various issues raised concerning the athletic provisions of the proposed regulation. Numerous comments were received favoring a proposal submitted by the National Collegiate Athletic Association that the revenue earned by revenue-producing sports be exempted from coverage under this regulation. Other comments were submitted against this proposal.

Id. at 24,134.

70. *Id.* See *Sex Discrimination Hearings*, *supra* note 14; YALE Note, *supra* note 4, at 1257.

71. 40 Fed. Reg. 24,134 (1975).

Paragraph 86.38(c) of the proposed regulation required all recipients sponsoring athletic activities to take certain affirmative efforts with regard to members of the sex for which athletic opportunities have been limited notwithstanding the lack of any findings of discrimination. Since such a requirement could be considered "affirmative action," and was somewhat inconsistent with Section 86.3, it has been deleted.

Id.

72. See Cox, *supra* note 4, at 63; YALE Note, *supra* note 4, at 1257. "Impassioned commentary and lobbying by the National Collegiate Athletic Association (NCAA) and others however, led HEW to issue significantly narrower final regulations in 1975." *Id.*

73. 40 Fed. Reg. 24,128 (1975) (codified at 45 C.F.R. Part 86). The final regulations specifically authorized a three-year adjustment period for "a recipient which operates or sponsors interscholastic athletics at the secondary or post-secondary school level." *Id.* at 24,143. This adjustment period ended July 21, 1978.

74. 45 C.F.R. § 86.41 (1980). Section 86.41 of the regulation states:

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be

section begins with a general prohibition against sex discrimina-

treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment Period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as

tion in "any interscholastic, intercollegiate, club or intramural athletics offered by recipient" institutions.⁷⁵ Subsection (b) allows a college or university to operate sex-segregated teams when team selection is based on competitive skill.⁷⁶ The final regulations also added an exception for contact sports, which has since become a controversial aspect of the regulations.⁷⁷ Separate teams are allowed for boxing, wrestling, rugby, ice hockey, football, basketball, and other sports that involve bodily contact.⁷⁸ Under the regulations, a female athlete is not allowed to try out for a contact sports team, despite the fact that her athletic opportunities may have previously been limited in this sport.⁷⁹ These two exceptions exclude many women from participation because competitive skill in team selection is almost always a factor and because contact sports, most notably football and basketball, comprise the major athletic events at most colleges and universities.

Section 86.41(c) of the final regulations sets forth criteria by which HEW will measure whether recipient institutions provide equal opportunity in athletics.⁸⁰ The first and most important criterion is "[w]hether the selection of sports and levels of competition effectively accommodates the interests and abilities of both sexes"⁸¹ HEW will consider ten factors⁸² to determine whether this provision has been met. These factors allow HEW to assess institutional compliance by measuring the availability and quality of specific items, such as the provision of equipment and supplies, travel and per diem allowances, and the provision of housing and dining facilities.⁸³ Equal aggregate expenditures for each sex or for sex-segregated teams are not required, but HEW may compare the funds provided for each sex in each cat-

expeditiously as possible but in no event later than three years from the effective date of this regulation.

75. *Id.* § 86.41(a).

76. *Id.* § 86.41(b).

77. *Id.* "The contact sports exception is difficult to justify, either on the basis of physical differences between the sexes or as a matter of statutory interpretation." Cox, *supra* note 4, at 44. See note 154 *infra*.

78. 45 C.F.R. § 86.41(b) (1980).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* See note 74 *supra*, for text of this subsection.

83. *Id.*

egory to determine whether the institution is providing equality of opportunity for both sexes.⁸⁴ The remaining sections of the final regulations set forth the adjustment period⁸⁵ and the requirements for athletic scholarships.⁸⁶

The final regulations, although retaining the important equal opportunity provision, differ from the proposed regulations in several important respects. By deleting the affirmative efforts section, HEW has substantially reduced an institution's responsibility for effective and immediate compliance with the mandates of Title IX. The proposed regulations required dissemination of information concerning the availability of athletic opportunities. Additionally, they required training activities designed to expand and improve athletic capabilities. These sections were eliminated from the final version. By adding the contact sports exception, HEW provided yet another loophole through which institutions may avoid compliance with the purpose of Title IX. As a result, the final regulations retreat from the coverage of the proposed procedures.⁸⁷

III. THE POLICY INTERPRETATION

To clarify the meaning of the final regulations and to provide athletic programs with detailed guidelines for compliance with Title IX, HEW issued a proposed and then a final set of policy guidelines. The proposed policy interpretation was issued December 11, 1978.⁸⁸ During the public comment period that

84. *Id.*

85. *Id.* § 86.41(d).

86. *Id.* § 86.37(c). This subsection provides:

Athletic scholarships. (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41.

87. "The final HEW regulation apparently retreated from the proposed regulation by adding the contact sports exception, deleting the language requiring 'affirmative efforts' to increase opportunities for women, and dropping the annual 'determination of student interest' requirement." Cox, *supra* note 4, at 63.

88. 43 Fed. Reg. 58,070-76 (1978).

followed, HEW received more than 700 responses.⁸⁹ HEW staff members visited eight universities during June and July of 1979 to observe how the proposed policy would apply in actual practice.⁹⁰ Based on these observations, and the nearly 100 complaints alleging discrimination in athletics against more than 50 institutions, HEW decided that it should provide further guidance, primarily concerning the application of Title IX to intercollegiate athletic programs.⁹¹ The result was the final policy interpretation, issued December 4, 1979.⁹² The final policy interpretation merits extensive discussion both because it presents the fullest statement of how HEW will determine statutory compliance, and because the courts must consider the guidelines when deciding cases of alleged sex discrimination in athletics.⁹³ The policy interpretation does not have the full force and effect of law,⁹⁴ but a reviewing court is required to give "great deference" to an agency's interpretation of the statute.⁹⁵ Because the guidelines set forth in the final policy are based on approved regulations and therefore have a reasonable basis in law, they carry substantial weight in determinations of institutional compliance with Title IX.⁹⁶

The guidelines underwent substantial changes between issuance of the proposed and final policies. The changes cannot be

89. 44 Fed. Reg. 71,413 (1979).

90. *Id.*

91. *Id.* The proposed policy interpretation was designed specifically for intercollegiate athletics. The general guidelines, however, can apply to club, intramural, and interscholastic athletic programs, all of which are covered by the regulations. *Id.*

92. 44 Fed. Reg. 71,413 (1979). The final policy interpretation became effective December 11, 1979.

93. See note 95 *infra*.

94. Because HEW has complied with publication rules similar to the regulations and steps have been taken to submit the final policy to Congress for review, however, HEW may claim that the guidelines have the full force and effect of law. Gaal & DiLorenzo, *supra* note 24, at 163 n.12.

95. See *Fredericks v. Kreps*, 578 F.2d 555 (5th Cir. 1978) (if interpretation given a statute by agency charged with its administration is reasonable, a court must sustain the agency's actions even though the court might consider an alternative approach more reasonable); *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979) (in seeking to construe meaning of statutory provision, great, even decisive, weight should be accorded to the continuous practical construction accorded the provision by those with the responsibility to administer it); *Cape Fox Corp. v. United States*, 456 F. Supp. 784 (D. Alaska 1978) (great deference should be accorded to agency's interpretation of its own guidelines even though guidelines are not regulations).

96. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (when construction of administrative regulation rather than statute is in issue, deference is even greater).

fully appreciated without a brief examination of the proposed policy.

A. THE PROPOSED POLICY

The proposed policy was based on two factors HEW considered important in establishing criteria for determining compliance with the statute.⁹⁷ First, most colleges and universities have traditionally emphasized sports for men.⁹⁸ This emphasis has contributed to differences "in the number of sports and scope of competition offered to men and women."⁹⁹ Consequently, disproportionately more aid has been made available for male athletes than for female athletes.¹⁰⁰ Second, despite the discrepancies in coaching, equipment, access to facilities, publicity, and housing, women's participation in intercollegiate athletics increased 100 percent during the period from 1971 to 1976.¹⁰¹

Taking these factors into account, the department divided the proposed policy into two sections. The first, entitled "Eliminating Discrimination in Existing Programs,"¹⁰² set forth a two-part approach to determine whether a college or university had eliminated discrimination on the basis of sex in its existing programs.¹⁰³ Part A of this section listed factors HEW considered important in determining whether an institution provided equal athletic opportunity.¹⁰⁴ Thus, for example, under this section an

97. 43 Fed. Reg. 58,071 (1978).

98. *Id.* Of the 395,000 students participating in intercollegiate sports in the academic year 1976-1977, 74% were men and 26% were women. HEW based these figures on data from the AIAW, which was based on participation data from the NCAA, the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA). *Id.* at 58,071 n.6.

99. 43 Fed. Reg. 58,071 (1978). "On the average, colleges and universities provide approximately ten sports for men and only six for women." *Id.* This finding is based on limited data from the NCAA. *Id.* at 58,071 n.7.

100. 43 Fed. Reg. 58,071 (1978). As of 1978, the average annual scholarship budget was \$39,000. Male athletes received 82% of this amount while female athletes received only 17.9% of the total, despite the fact that women constituted 26% of the participating athletes. These figures were obtained from the AIAW, STRUCTURE IMPLEMENTATION SURVEY DATA SUMMARY (1978). 43 Fed. Reg. 58,071 n.8 (1978).

101. 43 Fed. Reg. 58,071 (1978).

102. *Id.* at 58,072 (1978).

103. *Id.*

104. Part A provides:

Equality of benefits and opportunities in many aspects of a recipient's intercollegiate athletic program can best be measured in financial terms. Financially measurable benefits and

institution would be found in compliance with this provision if it offered substantially equal average per capita funds to participating male and female athletes for scholarships, recruitment, and other financially measurable benefits.¹⁰⁵ Part B focused on opportunities not financially measurable and provided a more expansive interpretation of the equal opportunity provisions of the regulations.¹⁰⁶

The second section of the proposed policy required affirmative efforts by colleges and universities to effectively accommodate the athletic interests and abilities of both sexes.¹⁰⁷ A recipient institution would be required to demonstrate that it included procedures designed to encourage women to participate, to increase the number of women's sports, to publicize the athletic opportunities for women, and to elevate the scope of women's intercollegiate competition.¹⁰⁸ An institution choosing not to follow these procedures could nevertheless satisfy the equal opportunity provision by demonstrating that the sports currently offered to women were comparable to those offered to men.¹⁰⁹ In addition, a university would be in compliance if it could show a pattern of increased participation by women and if it could demonstrate that the institution's athletic program reflected the athletic interests of women.¹¹⁰

These procedures, similar to the affirmative efforts section found in the proposed regulations,¹¹¹ were deleted by HEW in

opportunities covered by the Title IX regulation [45 CFR 86.41(c)] include but are not limited to:

1. Financial assistance awarded on the basis of athletic ability;
2. Recruitment of athletes;
3. Provision and maintenance of equipment and supplies;
4. Living and travel expenses related to competitive events; and
5. Publicity.

Id.

105. *Id.* at 58,073. See note 119 *infra*, for an example of a per capita formula based on the criteria set forth in the final policy.

106. *Id.* at 58,071. See note 74 *supra*, for text of the equal opportunity provision of the final regulation.

107. 43 Fed. Reg. 58,074 (1978).

108. *Id.*

109. *Id.*

110. *Id.*

111. See notes 61-63 *supra* and accompanying text.

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the final policy interpretation. A clear trend exists for the proposed rules to embrace the more revolutionary goals¹¹² which are then deleted from the final versions. This may be attributed in part to the efforts of special interest groups such as the NCAA, which exerted pressure on HEW through a well-organized national campaign geared to oppose HEW's interpretation of the statute.¹¹³ These efforts effectively diluted the guidelines, allowing a university to comply with the retained provisions while only minimally encouraging participation by female athletes.

B. THE FINAL POLICY INTERPRETATION

The final policy interpretation is divided into three sections, which will be examined in the order in which they appear. To judge whether the interpretation is compatible with the goals of Title IX, one must determine whether the policy is consistent with the statute and with the implementing regulations. HEW has expanded the jurisdictional scope of Title IX by stating that the final policy will apply to "any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the depart-

112. Both the proposed regulations and the proposed policy interpretation contained sections which specifically required that affirmative efforts be made to encourage and upgrade the level of participation by women in intercollegiate sports. These procedures were revolutionary because they would have forced institutions not only to equalize opportunity for women, but to take steps in assuring that this opportunity be provided. See Cox, *supra* note 4, at 52.

113. *Women's Sports Face New Hurdles*, On Campus With Women, Spring 1979, at 1 [hereinafter cited as *On Campus With Women*]. (Copies of the newsletter may be obtained from the Project on the Status and Education of Women, Ass'n of American Colleges, 1818 R Street, N.W., Washington, D.C., 20009.) The article offers a detailed account of the NCAA's lobbying efforts:

The National Coalition for Women and Girls in Education, which generally views the proposed policy as a positive step toward the implementation of Title IX, charges that the anti-Title IX mail currently flooding the Congress and HEW is not representative of the majority of institutions and individuals affected by the law, but the result of a well-financed lobbying effort by the NCAA and a few schools that have not taken steps to eliminate sex discrimination in their athletic programs. The Coalition also claims the national education associations are not representing the interests of those on campus in this matter, and that women lack the financial resources and political sophistication needed to make their voices heard in Washington.

Id. at 1.

ment."¹¹⁴ Other changes in the final policy will be revealed by examining each of the three sections separately.

Athletic Financial Assistance (Scholarships)

Section A, entitled "Athletic Financial Assistance,"¹¹⁵ assesses compliance with the scholarship provisions of the regulation.¹¹⁶ Under this section, HEW will conduct a "financial comparison to determine whether proportionately equal amounts of financial assistance are available to men's and women's athletic programs."¹¹⁷ According to former Secretary Patricia Roberts Harris, this means that "if 70 percent of a school's athletes are male, they are entitled to 70 percent of the financial aid dollars their school makes available."¹¹⁸ HEW will evaluate an institution's award of financial assistance by determining the amount of aid available to men and then dividing that amount by the number of men who participate in the athletic program.¹¹⁹ It will

114. 44 Fed. Reg. 71,414 (1978).

The new interpretation's statement attempts to expand considerably HEW's jurisdiction by shifting the focus from "programs" in receipt of federal aid to "institutions" in receipt of federal aid. Under this more recent pronouncement, coverage of an athletic program will be asserted if the institution itself merely receives or benefits from federal financial assistance regardless of any specific benefit to the athletic program.

Gaal, DiLorenzo & Evans, *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J. COLL. & U.L. 345, 352 (1980).

115. 44 Fed. Reg. 71,415 (1979).

116. *Id.* See note 86 *supra*.

117. 44 Fed. Reg. 71,415 (1979).

118. Press Conference of Patricia Roberts Harris, former Secretary of HEW (Dec. 4, 1979).

119. This interpretation of the scholarship provision and the following hypothetical are based on a telephone interview with Lionel S. Sobel, Esq. (Oct. 21, 1980) [hereinafter cited as Sobel Interview]. For example, if the aggregate amount available is \$300,000 and there are 300 male athletes, the amount per participant would be \$1,000. Correspondingly, if the aggregate amount available for female athletes is \$100,000 and there are 100 participants, the amount per athlete would come to \$1,000. Based on this hypothetical, the institution would be in compliance. A possible violation may occur where only \$80,000 is made available to the women's program but there are 100 participants, in which case the amount per athlete would be only \$800. If this discrepancy is based on non-discriminatory factors, however, the institution may still be in compliance despite the unequal allocation. See 44 Fed. Reg. 71,415 (1979). See notes 122-125 *infra* for examples of nondiscriminatory factors.

HEW defines "participants" as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room

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also determine the amount of aid made available to women and will divide that amount by the number of female athletes.¹²⁰ Ideally, the resulting per capita amount of aid available to men should be the same as the per capita amount available to women.¹²¹ HEW will allow universities to justify some funding disparities by showing that nondiscriminatory factors caused the resulting differences.¹²² These factors may include tuition for out-of-state students or a decision to spread the scholarship money over a full generation of athletes.¹²³ For example, if 95 football players—75 of whom come from out-of-state—receive scholarships, HEW may allow an imbalance in the resulting averages because tuition for these players is higher.¹²⁴ An athletic director may also arbitrarily decide that the available scholarship money should be distributed over a four-year period for purposes of team development. Although twelve basketball scholarships may be available for women, the athletic director may choose to allocate three full scholarships per year for four years.¹²⁵ HEW will allow this kind of per capita distribution despite the resulting disparity in the average amount of scholarship aid provided for men and women. Because Section A does not require that a proportionate number of scholarships be of equal dollar value, the manner in which expenditures can be made for men and women continue to differ substantially.¹²⁶

services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport; or

d. Who, because of injury, cannot meet a, b or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. 71,415 (1979).

120. 44 Fed. Reg. 71,415 (1979).

121. *Id.*

122. *Id.* See note 119 *supra*.

123. *Id.*

124. Sobel Interview, *supra* note 119.

125. *Id.*

126. As a result of NCAA rules applicable to scholarships, for example, male athletes who participate in football and basketball are routinely offered full scholarships despite the fact that they are not required to show a financial need for the money:

NCAA regulations permit a maximum of 95 "full ride" grants-in-aid (tuition, room and board) for football athletes and 15 "full ride" grants-in-aid for basketball athletes. Almost all athletes in these two sports, in other words, are permitted to be on full scholarship. Recent efforts by Division I institutions

The men's program may award full scholarships to some of its athletes while the women's program may offer partial scholarships to a larger number of athletes.¹²⁷ Although women would receive smaller awards than those men who receive awards, this would not violate the policy's standard.

Despite the need for incentives to upgrade the levels of competition available to women's teams, an institution might artificially restrict the development of these teams to keep costs down.¹²⁸ Because there is no time limit on deferral of scholarship funds, nor any requirement that the funds actually be carried forward and made available for the particular sex which does not receive the aid in a given year, a director could technically discourage the development of the women's team.¹²⁹ While ostensibly providing for an equitable distribution of available scholarship money based on participation, the inclusion of the nondiscriminatory factors weakens the force of Section A. Women denied adequate scholarships as a result of a programmatic decision have little recourse despite the unequal per capita allocation. Although HEW's method of determining compliance provides flexibility in measuring the distribution of scholarship assistance, it does not guarantee this assistance will be shared equitably. Thus the use of nondiscriminatory factors may serve to slow the pace of compliance with Title IX.

to limit grants-in-aid to athletes with proven financial need have not been successful.

. . . .
 . . . Although AIAW regulations also permit "full ride" grants-in-aid for female athletes . . . AIAW data show that women receive considerably less money for grants-in-aid than men.

MORE HURDLES TO CLEAR, *supra* note 3, at 30 (footnotes omitted). For example, at Syracuse University, 83% of the available scholarship money goes to the 75% male athletic population while only 17% goes to the women who comprise 25% of the participating athletes. deCrow, *Hardlining Title IX: Who's Off-Side Now?*, PERSPECTIVES, Summer 1980, at 18-19.

127. See *Update on Title IX and Sports #2, On Campus With Women*, *supra* note 113.

128. *Id.* Because the distribution of available scholarship money is left to the discretion of the athletic director, the manner in which expenditures are made may determine the growth of the team. See text accompanying note 125 *supra*.

129. *Update on Title IX and Sports #2, On Campus With Women*, *supra* note 113. "Thus a director could technically decide to defer some or even all women's awards in a particular year, claiming that 'next year' would be a better time to encourage a particular women's sport." *Id.* at 4.

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Equivalence of Benefits and Opportunities

Section B, entitled "Equivalence in Other Athletic Benefits and Opportunities,"¹³⁰ provides a more expansive list of criteria for determining whether an athletic program is nondiscriminatory. Using the equal opportunity provision of the regulation as its basis,¹³¹ the Department will compare the "availability, quality, and kinds of benefits, opportunities and treatment afforded members of both sexes"¹³² to assess compliance. HEW lists nine nonfinancial factors to be used in evaluating whether men and women are receiving equal benefits:

- (1) Provision and maintenance of equipment and supplies;
- (2) Scheduling of games and practice times;
- (3) Travel and per diem expenses;
- (4) Opportunity to receive coaching and academic tutoring;
- (5) Assignment and compensation of coaches and tutors;
- (6) Provision of medical and training facilities;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of housing and dining facilities; and
- (9) Publicity.¹³³

HEW bases its compliance determination on whether each of these program components are equivalent, that is, equal or equal in effect.¹³⁴ Additionally, HEW will examine the recruitment practices of the athletic programs for both sexes to determine whether the goal of equal opportunity will require modification of those practices.¹³⁵ Identical recruiting methods are not required although nondiscriminatory criteria must be used in structuring recruitment programs.¹³⁶ The proposed policy listed recruitment under the financially measurable benefits section,¹³⁷ subject to the per capita formulation. By removing it from that section, recruitment is no longer assessed by a financial compari-

130. 44 Fed. Reg. 71,415-17 (1979).

131. See note 74 *supra*, for text of equal opportunity provision of the final regulations.

132. 44 Fed. Reg. 71,415 (1979).

133. *Id.* at 71,415-17.

134. *Id.* at 71,415.

135. *Id.* at 71,417.

136. *Id.*

137. 43 Fed. Reg. 58,072 (1978).

son to determine whether benefits are distributed in a proportionate fashion. The standard now used to measure compliance is, more generally, equality of opportunity.¹³⁸ One author argues that this measurement, as applied to recruitment, will not prevent discrimination.¹³⁹ In fact, "[t]he shift is away from a comparison by sexes to, essentially, an inter-institutional comparison within each sex group which could permit, not forestall, discrimination."¹⁴⁰ As a result, recruitment practices which require more money to attract the best male athletes¹⁴¹ may go unchecked.

HEW defends its Section B criteria by claiming that identical opportunities are not required and that disparities may be justified by nondiscriminatory factors.¹⁴² The "unique aspect of a particular sport" or "activities which are directly associated with a competitive event in a single sex sport"¹⁴³ are examples of such factors. Features which are considered "directly associated with a competitive event" include "rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities."¹⁴⁴ This provision was promulgated to exempt institutions from having to provide equal athletic opportunities in sports traditionally played by men. Football, for example, is unique for its high per capita cost.¹⁴⁵ This feature virtually exempts football from con-

138. 44 Fed Reg. at 71,415.

139. See Gaal, DiLorenzo & Evans, *supra* note 114, at 357.

140. *Id.*

141. See, e.g., Axhelm, *The Shame of College Sports*, NEWSWEEK, Sept. 22, 1980, at 54.

142. 44 Fed. Reg. 71,415-16 (1979).

143. *Id.*

144. *Id.*

145. See Spink, *Popular, But Expensive*, 16 NCAA News, No. 17, at 2 (1980).

From head to toe, it costs between \$250 and \$400 to outfit a college football player. The bill goes something like this: Helmet, \$70; shoulder pads, \$40; shoes, \$40; jersey, \$20; pants, \$40; girdle pads, \$15; thigh pads, \$15; knee pads, \$5; mouthpiece, \$2; socks, \$2; sanitary shorts, \$3; and supporter, \$1. Add optional elbow, forearm and hand pads, \$20, and shoulder pad extensions, \$12, and the total of \$260. That isn't all. You need a couple of jerseys and pants of different colors since the teams play home and away games, plus foul-weather capes and practice uniforms, and you're up to around \$400 a player.

Id. "The average college with Division I football spends \$1,045,000 on that sport, or 47

sideration when determining whether equality of opportunity is present. Because single sex sports such as football and basketball are conducted on a national level, per capita expenses are greater than expenses for sports conducted at a regional or local level. A women's team in the initial stages of development, and therefore confined to the local level, would not receive the same degree of institutional support that the more popular, male-dominated sports receive. HEW justifies this imbalance by noting the unique demands of these athletic events: "Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind."¹⁴⁶ When men's athletic events are assumed to be more commercially viable, and therefore more deserving of funds, efforts to increase the spectator appeal of women's athletic events will go unsupported. Because HEW considers the "particular sport" exception in determining whether institutions provide equal athletic opportunities, Title IX's broad prohibition against discrimination is not assured.

Effective Accommodation of Student Interests and Abilities

Section C of the policy interpretation provides guidelines for determining compliance with the provision of the regulation that requires an athletic director to consider "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."¹⁴⁷ HEW assesses compliance by examining the interests and abilities of athletes, the selection of sports offered, the levels of competition available, and the opportunity for team competition.¹⁴⁸ If an institution sponsors a team for men in a specific sport, it may be required to permit women to try out for that team or to sponsor a separate team.¹⁴⁹ With regard to contact sports,¹⁵⁰ if an institution sponsors a team for members of one sex, it must also pro-

percent of its men's athletic budget. The average Division I football squad is composed of 106 athletes; these colleges therefore spend an average of \$9,858 on each football athlete." MORE HURDLES TO CLEAR *supra* note 3, at 29 (footnotes omitted).

146. 44 Fed. Reg. 71,416 (1979).

147. *Id.* at 71,417.

148. *Id.*

149. *Id.* at 71,418.

150. See text accompanying note 78 *supra*, for those sports which HEW considers contact sports.

vide a team for members of the other sex. This will be required only if sufficient interest and ability to sustain a viable team with a reasonable expectation of intercollegiate competition is shown.¹⁵¹ If opportunities for one sex have been historically limited, a separate team may be required.¹⁵² In non-contact sports, HEW additionally requires an institution to sponsor a separate team if members of the excluded sex lack sufficient skill to be selected for a single integrated team.¹⁵³

The contact sports exception is the subject of continuing debate.¹⁵⁴ Assuming that the women's team in any given sport does not have a reasonable expectation of intercollegiate competition,¹⁵⁵ the exceptional sportswoman may desire a place on the men's team so that she may develop her full athletic potential. Unfortunately, the final policy does not set forth specific guidelines which might guarantee her participation should she qualify. If she is denied an opportunity to compete, the prospect of equal opportunity will be limited. Even if the institution sponsors a separate women's team, her skill level may never be matched by other team players. Additionally, when only a minority of women are interested in contact sports, under Section C, these women will be denied an opportunity to compete.

The contact sports exception is not justified on the basis of statistics concerning risk of injury to women.¹⁵⁶ Research on the

151. 44 Fed. Reg. 71,418 (1979).

152. *Id.*

153. *Id.*

154. See Cox, *supra* note 4, at 44-45 (contact sports exception does not further statutory purpose); Hitchens, *A Litigation Strategy on Behalf of the Outstanding High School Female Athlete*, 8 GOLDEN GATE U.L. REV. 423 (1979) (the exceptional female athlete denied an opportunity to compete on male teams in contact and noncontact sports may not develop full athletic potential); Note, *Title IX of the Education Amendments of 1972: Issues Reach the Courts*, 18 WASHBURN L.J. 310, 323 (1979) ("Disapproval of the contact sport regulation is not surprising, for its total denial of opportunity to participate in an education activity on the basis of sex is clearly inconsistent with Title IX's equal opportunity purpose.").

155. For example, although there may be substantial interest and ability to sustain a women's football team in one institution, this level of interest may not be matched by women players at other institutions thus decreasing the opportunity for intercollegiate competition.

156. Cox, *supra* note 4, at 44, notes that:

Opposition to mixed competition in contact sports is based on an underlying belief that women will have a higher rate of injuries than men if men and women compete against

physical and athletic differences between men and women indicates that in some ways the female's endurance level may be equal to or greater than the male's.¹⁵⁷ Records demonstrate that differences in performance potential between men and women in athletic events are diminishing,¹⁵⁸ and sports physiologists have shown that women can compete as actively as men in all sports.¹⁵⁹ Despite this data, however, the cultural taboo against

each other. To justify the contact sports exception in intercollegiate athletics because of the increased injury risk to women, one must conclude that women are more susceptible to injuries than men at the same levels of ability, a conclusion that is far from obvious. Statistics concerning the relative size, weight, and likelihood of injury of average women and men are irrelevant, for example, to the possible exclusion of all women from an intercollegiate football team, because neither average women nor average men could normally compete on such teams.

(Footnotes omitted.)

157. "As more and more women enter long distance events, such as the marathons and multievent supermarathons, evidence is growing that their endurance may be equal or perhaps even superior to men's in some ways, and their systems may be more efficient in turning stored fats into energy." Wood, *The Emerging Woman Athlete*, Sunday Examiner & Chronicle, May 25, 1980, at 5, col. 1. Another author finds that women are better suited for long distance events:

In general, a woman needs less food than a man of equal weight; she has more accessible calories to burn in the same activity because of the thicker layer of fat under her skin. This fat gives her a larger reserve energy supply for endurance contests, so she is less dependent on carbohydrate loading—filling up on starch to build up stores of glycogen fuel in the muscles. The insulating fat also makes a woman's slightly lower body temperature more stable than a man's. She relies less on sweating to dissipate heat; therefore she retains fluid and salts better and doesn't need to drink as much during exertion. As a result of this difference, a woman tends to perform better in cold but has less tolerance of heat than a man of equal size.

Cimons, *How Women Got To Run The Distance*, MS., July 1981, at 47.

158. Wood, *supra* note 157, at 5.

159. Sports physiologists have demonstrated that women can play as actively as men, that Olympic athletes have competed and won at all stages of the menstrual cycle, and that exercise, if anything, is beneficial rather than harmful in alleviating menstrual complaints. The effect of training and competition on the ease of childbirth is pronounced. A study of Olympic athletes showed that they delivered their babies 87.2 percent faster than established norms, with 50 percent fewer Caesarian sections than in normal populations. Another study found that women with chronic fatigue and low back pain following pregnancy suffered primarily from the lack of physical activity dating from poorly developed anterior abdominal musculature.

MORE HURDLES TO CLEAR, *supra* note 3, at 5 (footnotes omitted). The stereotype regard-

women participating in contact sports remains.¹⁶⁰ Women have been conditioned throughout their lives to avoid displays of strength which, in turn, has inhibited their desire to perform in athletic competitions.¹⁶¹ Thus, sport, according to the stereo-

ing women's physical fragility while menstruating or while pregnant is based upon myths which reinforce female passivity.

160. Due to the stereotypic view of female behavior, the sportswoman who participates in contact sports with men or in sports which require overt aggressive behavior may suffer anxiety over the conflict between her desire to compete and her desire to conform to the accepted role model which society has given her.

It would seem that this anxiety is the expression of the inner conflict between desires to fulfill the expectations outlined by society. Horner has identified the female's conflict between her competitive desires and her desire to fit into society as a double bind. Performance in sport especially intensifies this conflict because athletics is one area that has been historically appropriate for males only. Thus, for the female athlete, it is not only that she has exhibited qualities that do not conform to society's 'appropriate sex-role' but that she has actively pursued this nonappropriate behavior in what was an exclusively male territory.

Del Rey, *The Apologetic and Women in Sport*, in *WOMEN AND SPORT*, *supra* note 1, at 108 (footnote omitted). As one author notes, "To be female and an athlete have been contradictory role expectations." Mathes, *Body Image and Sex Stereotyping*, *WOMEN AND SPORT*, *supra* note 1, at 66. The existing stereotypic differences tend to reinforce the idea that women are passive, emotional, and expressive while men are active, aggressive, and effective. In contemporary American culture, this is a deeply received way of thinking about the sexes. The differences are not only approved of, but are often idealized.

The ideal woman is perceived as significantly less aggressive, less independent, less dominant, less active, more emotional, having greater difficulty in making decisions, etc., than the ideal man; the ideal man is perceived as significantly less religious, less neat, less gentle, less aware of the feelings of others, less expressive, etc., than the ideal woman. Both greater competence in men than in women, and greater warmth and expressiveness in women than in men, then, are apparently desirable in our contemporary society.

Broverman, Vogel, Broverman, Clarkson, & Rosenkrantz, *Sex-Role Stereotypes: A Current Appraisal*, in *WOMEN AND ACHIEVEMENT*, *supra* note 2, at 39. Thus, there are social pressures which the female athlete must resist and overcome before her participation in contact sports will be regarded as healthy, not only by other athletes, but, it is hoped, by society at large.

161. No doubt exists that men are stronger than women, but the actual strength of women, particularly in this country, has been underestimated. The potent social stigma that is attached to the attainment of strength by females is a powerful influence that certainly must affect the amount of force produced by females on strength tests . . . A compounding factor is that many strength tests are administered to females in groups, or worse, in the presence of males. Finally, almost all experimentors who have measured the strength of females are

type, is "not so serious nor central to women."¹⁶² As more media attention focuses on women's achievement in sport, this societal barrier, often internalized by women, may diminish. Demystification of sport must begin in the schools where young girls receive their first exposure to team competition. If higher educational institutions continue to exclude the female athlete from contact sports because of cultural and economic pressures, not only will her athletic potential be limited; her opportunity for a future career in professional sports will be stifled.

IV. REMEDIES

A. ADMINISTRATIVE PROCEDURES

Despite the weaknesses inherent in the final policy interpretation, sportswomen who suffer discrimination should vigorously pursue their rights using both the administrative procedures available under Title IX and their private right of action. The first step is to notify the institution that the alleged discrimination violates Title IX.¹⁶³ For example, if the women's crew team

males. Adolescent females are loathe to display strength under any circumstances, but particularly in the presence of a male. In summary, women are certainly not as strong as men, but they may not be as weak as they have been credited to be. More specifically, the age of 12½ as the age of maximum strength may be an artifact of the adolescent society.

F. GERBER, J. FELSHIN, P. BERLIN & W. WYRICK, *supra* note 1, at 429. One author notes that there is "common agreement that the upper body of the female has about 50 to 60 percent the strength of the male and the lower body has 70 to 80 percent the strength of the male. When a correction is made for size, the female has about 80 percent of the strength of a male." Hudson, *Physical Parameters Used for Female Exclusion from Law Enforcement and Athletics*, in *WOMEN AND SPORT*, *supra* note 1, at 35. Cultural expectations tend to diminish the chance that an average girl has of developing upper body strength as early as the fifth year. Girls and women are conditioned not to show strength. Evidence shows that through puberty muscles grow first in size and later in strength. Because strength depends on appropriate physical exercise, and the adolescent environment is not conducive to athletic training for girls, this period is perhaps the most important reason behind the lack of strength in most women. As a result, differences between men and women appear to be more a function of activity level than gender. *Id.* at 40-41. To make a fair comparison of performance potential between the sexes, events with equivalence in training, motivation, equipment, and structural composition should be examined. *Id.* at 49.

162. F. GERBER, J. FELSHIN, P. BERLIN, & W. WYRICK, *supra* note 1, at 206. The authors maintain that societal assumptions regarding female athletes create the very conditions which denigrate sport as an activity for women. *Id.*

163. Telephone interview with Sheryl Sklorman, Project Assistant at SPRINT, a project of the Women's Equity Action League Educational and Legal Defense Fund in Washington, D.C. (Jan. 5, 1981).

has access to the boats at five a.m., while the men's team always uses the boats in the afternoon, the athletic department and the administration should be informed of the unequal accommodation.¹⁶⁴ If an institution covered by Title IX does not voluntarily act to correct the discrimination, the athlete may then file a letter of complaint with the Department of Education (Department).¹⁶⁵ The complaint must be filed within 180 days after the discrimination occurs unless the illegal activity is ongoing.¹⁶⁶ If the athletic program has a history of discrimination still in operation, the athlete may file her complaint at any time. The complaint should include a detailed description of the alleged violations.¹⁶⁷ The Department must investigate the complaint within ninety days of receipt.¹⁶⁸ If the Department finds the institution

164. Systematic procedures on how an athlete might organize an effort to make a particular institution aware of discrimination may be obtained by writing to SPRINT, Project of the Women's Equity Action League Educational and Legal Defense Fund, 805 15th St., N.W., Washington, D.C. 20005.

165. 45 C.F.R. § 80.7(b) (1974). See NOW LEGAL DEFENSE AND EDUCATION FUND, PROJECT ON EQUAL EDUCATION RIGHTS, ANYONE'S GUIDE TO FILING A TITLE IX COMPLAINT, (1980) [hereinafter cited as GUIDE]. Reprints are available through PEER, 112 13th St., N.W., Washington, D.C. 20005. Administrative remedies under Title IX are identical to those of Title VI. See note 13 *supra* and accompanying text, for a discussion of similarities between the statutes.

166. 45 C.F.R. § 80.7(b) (1980).

167. See GUIDE, *supra* note 165, at 1. The letter should also include the name and address of the university, a general description of the person(s) suffering from discrimination, and the approximate date(s) of discrimination. *Id.*

168. 44 Fed. Reg. 71,418 (1979). This section provides:

The process of Title IX enforcement is set forth in Section 86.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964. The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.

According to the regulation, there are two ways in which enforcement is initiated:

Compliance Reviews—Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. (45 CFR 80.7(a)).

Complaints—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b)).

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the

in violation and the school does not voluntarily comply, the Department will begin a formal process leading to termination of federal assistance.¹⁶⁹

Although these procedures are outlined in detail in the final policy interpretation, and the Office for Civil Rights is under court order to enforce them,¹⁷⁰ implementation has been ineffective.¹⁷¹ Due to lack of resources and the delay between initial

Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate.

169. 44 Fed. Reg. 71,419 (1979). See note 32 *supra*, for text of fund termination provision.

170. OCR is responsible for enforcing Title IX. In a consolidation of three cases, the District Court for the District of Columbia ordered OCR to conduct investigations of colleges and universities under two separate timetables set forth in the consent decree. *Adams v. Califano*, No. 3095-70 (D.D.C. 1977).

171. Continual criticism has been leveled at HEW's enforcement effort. In 1974 the Women's Equity Action League (WEAL), joined by other organizations and individuals, filed suit against HEW for failure to enforce Executive orders and statutes, including Title IX, that prohibit discrimination on the basis of sex in educational institutions and programs receiving Federal funds. In 1975 this Commission criticized HEW for its long delay in publishing final Title IX regulations, observing that the Department's Office for Civil Rights (OCR) had thereby "effectively nullified the intent of the Congress." A 1976 study by the Project on Equal Education Rights (PEER) concluded that HEW's enforcement efforts to that date had been "negligible", and another study completed that year found that HEW had failed to set "clear and consistent poli-

complaints and investigations, administrative procedures may be of limited use. An athlete may wait years before investigations are completed and compliance finally achieved.¹⁷² The administrative procedure is important, however, because the alternative—filing a lawsuit—may be financially infeasible for many student athletes.

B. PRIVATE RIGHT OF ACTION: RECENT CASES

Under *Cannon v. University of Chicago*,¹⁷³ a private right of

cies and enforce them to implement Title IX." In 1977 the U.S. District Court for the District of Columbia, in approving a settlement of the WEAL suit and two other cases involving HEW's civil rights enforcement practices, issued an order setting time frames for processing complaints and eliminating the complaint backlog and specifying the number of sex discrimination complaints to be processed and Title IX compliance reviews to be conducted the following year. Commonly known as the *Adams* order after another case it settled, the order noted in the preamble that if OCR staff were not further increased, compliance would require substantially increased efficiency.

. . . .
 . . . [I]n November 1979 OCR acknowledged that it had not complied fully with the Title IX requirements of the *Adams* order, having failed to resolve policy in three critical areas or devote sufficient staff resources to compliance reviews.

ENFORCING TITLE IX, *supra* note 11, at 3-5 (footnotes omitted). "In its submission to [the Supreme] Court, as well as in other public statements, HEW has candidly admitted that it does not have the resources necessary to enforce Title IX in a substantial number of circumstances" *Cannon v. University of Chicago*, 441 U.S. 677, 708 n.42 (1979). See also Note, *The Enforcement Provisions for Title IX of the Education Amendments of 1972 Can Be Strengthened to Make the Title IX Regulations More Effective*, 49 TEMP. L.Q. 207, 221 (1975).

172. *Universities Charged With Sex Discrimination in Athletics Under Title IX*, SPRINT, IN THE RUNNING, No. 3, 1980, at 2 (complaints filed in 1973 still pending).

173. 441 U.S. 677 (1979). Geraldine Cannon applied for admission in 1974 to medical school at the University of Chicago and Northwestern University. She was denied admission allegedly due to her age; both schools had express policies against admitting individuals over thirty without advanced degrees. Ms. Cannon was 39 years old at the time of her application. After seeking reconsideration from admission officials, she submitted a complaint to the Chicago Office of HEW alleging the medical schools had violated Title IX by denying her admission on the basis of sex. Both schools were recipients of federal funds. After receiving only an acknowledgment of her complaint from HEW, Ms. Cannon filed suit in federal court in the Northern District of Illinois. The court dismissed the action for lack of jurisdiction and failure to state a claim for relief. *Cannon v. University of Chicago*, 406 F. Supp. 1257 (N.D. Ill. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977). The issue on appeal to the U.S. Supreme Court was whether petitioner had a private right of action under Title IX. The Supreme Court reversed, holding that such a right was implied in the legislative history of the statute. 441 U.S. at 677-78. See Wallace, *How to Cure Your Sex Discrimination Ills: Take One Title IX Private*

action will be implied under Title IX.¹⁷⁴ Administrative remedies need not be exhausted before filing suit in federal court.¹⁷⁵ The court in *Cannon* based its conclusion, in part, on the fact that Title IX was specifically modeled after Title VI, which had been interpreted to provide a private remedy for the victim of discrimination.¹⁷⁶ Additionally, the court recognized the inadequacy of the administrative enforcement of the statute¹⁷⁷ when it stated that "an implied private right of action is necessary to insure the fundamental purpose of Title IX"¹⁷⁸

The most recent cases following the *Cannon* decision have been brought as class actions on behalf of members of university athletic teams alleging violations of Title IX.¹⁷⁹ In *Rollin Haffer v. Temple University*,¹⁸⁰ a suit currently pending, eight female athletes charged the university with discrimination in areas such as scholarships, facilities, equipment, financial support, and recruitment.¹⁸¹ A financial breakdown of fund allocation is set forth in the complaint as evidence of noncompliance.¹⁸² Plaintiffs allege that male athletes at Temple University received more than \$700,000 in scholarships during the 1979-1980 academic year, compared with \$188,000 in scholarships for women.¹⁸³ The University's Faculty Senate report indicated that,

Action and Cannon v. University of Chicago, Then Sue Them in the Morning, 1980 UTAH L. REV. 629; Comment, *Private Right of Action Under Title IX: Cannon v. University of Chicago*, 57 DENVER L.J. 437 (1980); Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.L. REV. 425 (1978); Comment, *Private Rights of Action Under Title IX of the Education Amendments of 1972: Cannon v. University of Chicago*, 3 HARV. WOMEN'S L.J. 141 (1980); Comment, *Implication of a Private Right of Action Under Title IX of the Education Amendments of 1972*, NW. U.L. REV. 772 (1978).

174. 441 U.S. 677 (1979).

175. *Id.* at 707 n.41.

176. *Id.* at 696.

177. *Id.* at 708.

178. *Id.* at 708 n.42.

179. *Rollin Haffer v. Temple Univ.*, No. 80-1362 (E.D. Pa., filed April 8, 1980); *Bennett v. West Texas State Univ.*, No. 2-80-73, (N.D. Tex., filed May 22, 1980); *Pavey v. University of Alaska*, 490 F. Supp. 1011 (D. Alaska 1980). The complaint in *Pavey* charged the university with discrimination against female students in its athletic program in violation of Title IX and the due process and equal protection clauses of the fourteenth amendment.

180. No. 80-1362 (E. D. Pa., filed April 8, 1980) (Complaint on file at the Golden Gate University Law Review Office).

181. Complaint at 1, *Rollin Haffer v. Temple Univ.*, No. 80-1362. See *On Campus With Women*, Fall 1980, *supra* note 113, for a report on the facts of the case.

182. Complaint at 12, 15, 29, *Rollin Haffer v. Temple Univ.*, No. 80-1362.

183. Complaint at 12.

even excluding money allocated to the school's football program, the budget for men's sports exceeded the women's intercollegiate athletic budget by 3.6 to 1, although the ratio of males to females participating in intercollegiate athletics at Temple was much closer.¹⁸⁴ This type of specific data is necessary to support allegations based on sections A and B of the final policy interpretation.

In another pending case, *Bennett v. West Texas State University*,¹⁸⁵ female athletes have brought a class action suit under Title IX alleging discriminatory practices in areas of scholarship, travel allowances, compensation and treatment of coaches, provision of locker room, practice, and office facilities, and provision of publicity, promotion, and awards.¹⁸⁶ Once again, the content of the allegations is based on sections A and B of the final policy interpretation. Although these two cases provide examples of initial litigation strategy, their effectiveness in court is unknown.

It is important that sportswomen who want to participate in contact sports also seek relief through the courts. The contact sports exception has been considered unconstitutional as applied to interscholastic sports in two recent federal court decisions.¹⁸⁷

184. *Id.* at 31.

185. No. 2-80-73, (N.D. Tex. filed May 22, 1980) (Complaint on file at the Golden Gate University Law Review Office).

186. Complaint at 56.

187. See *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978); *Yellow Springs Bd. of Educ. v. Ohio School Athletic Ass'n*, 443 F. Supp. 753 (S.D. Ohio 1978), *rev'd and remanded on other grounds*, 647 F.2d 651 (1981). In *Leffel*, plaintiffs were a class composed of all female public high school students in Wisconsin who wished to participate on public high school varsity athletic teams. They sought a declaration that a provision of the Wisconsin Interscholastic Athletic Association—which limited coeducational interscholastic activity—violated the equal protection clause of the fourteenth amendment to the United States Constitution. They also sought a permanent injunction enjoining enforcement of the provision. In defense, the athletic association claimed the provision conformed to the contact sports exception. The court recognized the contact sports exception but rejected this defense. "The enactment of Title IX did not remove the problem of sex discrimination from constitutional concern; congressional enactments cannot preempt provisions of the Constitution." *Id.* at 1120.

In *Yellow Springs*, the district court held the contact sports exception deprived "physically qualified girls of liberty without due process of law." 443 F.2d at 759. The court noted the stereotype on which many presumptions are based. "It has always been traditional that 'boys play football and girls are cheerleaders.' Why so? Where is it written that girls may not, if suitably qualified, play football?" *Id.* On appeal, the Sixth Circuit remanded the case for retrial, and issued an injunction temporarily forbidding the school board from enforcing the athletic association's rule. 647 F.2d at 658. The court

Exceptional female athletes are urged to follow in the wake of these precedents. Only through consistent court action will Title IX become an important tool for ending discrimination against women.

V. CONCLUSION

Ultimately, it is in the best interests of society to encourage women to develop their athletic potential, to "appreciate their physical abilities, and enjoy the mastery of their bodies in sporting activity."¹⁸⁸ One author urges an equalitarian approach and suggests that, "[i]f participation in sport is going to mold leaders, build stamina, heighten competitive spirit, produce physical fitness, create mental toughness and put students through college, then girls, as well as boys should have equal opportunity to participate in sport and gain such benefits."¹⁸⁹ If women are prevented from participating in those sports which traditionally draw the largest crowds, have the most capital at their disposal, and receive the greatest support from the university, they will not achieve equality.¹⁹⁰ They will continue to be discriminated against in those programs which have the greatest resources for developing athletic skills.

Had the final policy interpretation incorporated the suggestions of those who urged that specific measures be taken in implementing Title IX,¹⁹¹ equal opportunity may have been as-

did not consider whether HEW's regulation itself was unconstitutional. The dissent, however, did regard separate teams for girls and boys as a violation of the equal protection clause of the fourteenth amendment. *Id.* at 666 (Jones, J., dissenting).

188. See Duquin, *The Androgynous Advantage*, in *WOMEN AND SPORT*, *supra* note 1, at 97.

189. *Id.*

190. See Rose, *The ERA and Women's Sport: An Hypothetical Trial Case*, in *WOMAN AND SPORT*, *supra* note 1, at 237, in which the author suggests that the separate but equal model does not achieve true equality due to perpetuation of social barriers. The existence of separate teams may merely reinforce this cycle.

191. With regard to the proposed policy interpretation, it was stated:

The Title IX regulation specifically authorized a three year adjustment period (which ended on July 1, 1978) for post-secondary institutions to bring their athletic programs into compliance. This effort should have included attempts to increase participation rates and to improve levels of competition for women, but the new policy ignores this. Instead it requires only that inequities affecting present athletes be eliminated immediately, and that institutions have a policy which permits expansion of participation and competitive opportunities for

sured. The statute would have received its intended expression more readily if the policy specified the rate at which improvements should be made with regard to participation and levels of competition.¹⁹² It should have called for comparable participation rates and levels of competition as targets to be achieved within a fixed time frame.¹⁹³ In addition, the policy should have clearly stated that institutions are responsible for annually assessing newly developing interests and abilities in order to fulfill their Title IX obligations.¹⁹⁴ By disregarding these proposed procedures, HEW weakened the statute's general prohibition against sex discrimination in education.

Women must be encouraged to participate in those sports which, for so many years, have been closed to them. Only then will the stereotype of the woman as passive spectator begin to disappear and a new role model, based on athletic achievement, be emulated. The final policy interpretation, while it does set forth criteria for determining compliance with Title IX, fails to strictly regulate those areas where discrimination continues to exist. The absence of affirmative requirements, combined with the many loopholes and exceptions, undermines the important public policy goals which formed the basis of the statute. Whether or not sportswomen will truly achieve equality in intercollegiate athletics depends both upon their own initiative in pursuing their rights and the future dispositions of the courts. Whatever the outcome may be, the female athlete is only beginning to express her spirited involvement in American sport.

women to move forward at an undefined pace. Theoretically an institution can perpetually continue to plan to increase opportunities for women, and accomplish this at a very slow rate, and still be in compliance; i.e., an institution can take 20 or 30 years to encourage women and increase their participation in sports so long that it showed that some progress was being made.

Update on Title IX and Sports #2, On Campus With Women, *supra* note 113, at 4; See YALE NOTE, *supra* note 4, at 1273-78, which sets forth specific suggestions for alternative regulations.

192. *Update on Title IX and Sports #2, On Campus With Women*, *supra* note 113.

193. *Id.*

194. *Id.*

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